Sup. Court, U.S.
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No.

In The

Supreme Court of the United States

NATHAN MOORE,

Petitioner,

v.

THE HOME DEPOT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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36 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals' holding that an evidentiary hearing is not required to determine if a settlement agreement under Title VII was knowingly and voluntarily executed violates the precedent of this Court?

2. Whether the Court of Appeals' affirmance of the District Court's reliance upon State decisional law to determine the enforceability of a settlement agreement for claims based on federal law under Title VII violates the precedent of this Court?

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 14.1, the parties in the proceedings below were Nathan Moore and The Home Depot.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Nathan Moore respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is unreported and is reprinted in the Appendix to this Petition ("App.") at 1-3. The order of the district court is unreported and is reprinted at App. 4-9.

JURISDICTION

The court of appeals entered judgment on October 4, 2002. App. 1-3. Justice Kennedy extended the time for filing the petition for a writ of certiorari to and including February 1, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

FEDERAL PROVISIONS INVOLVED

Title VII of the Civil Rights Acts of 1964 and 1991, as amended.

STATEMENT OF THE CASE

This case involves a claim for employment discrimination. On October 1, 2001, Petitioner and Respondent

attended a mediation conference. App. 4. On October 2, 2001 and October 3, 2001, Petitioner filed with the District Court copies of letters he wrote to his attorney in which Petitioner stated that he did not consent to the terms and conditions of the settlement terms discussed at mediation, that he didn't understand the terms and lacked the ability to make a rational decision about any settlement. App. 5. Those letters are part of the record. App. 12-14. After the mediation, Respondent proposed a Settlement Agreement, entitled "Settlement Agreement and Full and Final General Release," which Petitioner refused to sign. App. 5.

On October 4, 2001, Respondent filed a motion to enforce the agreement purportedly reached during the mediation conference. App. 5. Petitioner opposed Respondent's motion to enforce the agreement. App. 4-5. Further, Petitioner advised the District Court that he was coerced by his then-attorney, Jacob Rose, to settle his case during the mediation conference. App. 12-14. Petitioner requested permission, and was prepared, to present evidence to support his opposition to Respondent's motion to enforce, but the District Court refused to take any evidence. App. 10.

On October 4, 2001, the District Court dismissed Petitioner's Title VII claims without conducting an evidentiary hearing. App. 4. On January 31, 2002, the District Court granted Respondent's motion to enforce the settlement, again without conducting an evidentiary hearing. App. 10. On October 4, 2002, the Eleventh Circuit Court of Appeals affirmed. App. 1-3.

REASONS FOR GRANTING THE PETITION

Given the long standing rule of this Court, holding that there is no valid waiver of rights under Title VII unless the claimant "knowingly and voluntarily" does so, may a District Court summarily, and without taking any evidence, enforce a document that effects such a waiver, even when the party against whom the waiver is asserted claims he was coerced and misled into executing the document? Moreover, may a District Court rely upon State law (rather than federal law) in determining whether the claimed waiver should be enforced?

First, a determination of whether there has been a waiver of Title VII rights requires more than a cursory review of a document; it requires the District Court to consider evidence, and then determine whether the waiver was "knowingly and voluntarily" made by the plaintiff. Without taking and hearing such evidence, this factual determination cannot be made.

Second, it is well established by this Court that federal law applies when a District Court determines whether or not there is a valid "waiver" of a federal claim. The Eleventh Circuit has split on this issue, and some of its decisions conflict with the holdings of other circuits.

I. PETITIONER WAS ENTITLED TO AN EVIDENTIARY HEARING

The starting point for a waiver of Title VII rights is the case of *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974), where this Court held that to effectuate a valid release in favor of an employer from claims under Title VII, the employee must "knowingly and voluntarily" execute same, and have a full understanding of the terms

of the agreement. Moreover, such an alleged "waiver" of remedial rights must be closely scrutinized. In this case there was no scrutiny whatsoever given to the claimed release by the District Court: no evidence was received at the evidentiary hearing; nor did the District Court make any inquiry of Petitioner about the circumstances under which he executed the mediation document; nor did the District Court inquire of the reasons Petitioner wrote to the Court to repudiate the mediation agreement the day following the mediation.

In *Alexander*, this Court faced the issue of whether an arbitration agreement, and the rights conferred thereby, could effect a waiver of Title VII claims, which the District Court and the Tenth Circuit had held was the case given the election of remedies doctrine. Recognizing that this doctrine applied only to electing from among inconsistent remedies, this Court reversed and squarely held that the provisions of a collective bargaining agreement could be relied upon by an aggrieved employee independently of remedies that Congress entrusted for enforcement to the federal Courts under Title VII. Moreover, pursuit of a contractually bargained for remedy (arbitration) did not constitute a waiver of the Congressionally legislated remedy (Title VII). 415 U.S. at 49-50.

This Court also discussed the circumstances under which a waiver of Title VII rights could be effected. "In determining the effectiveness of such waiver, a court would have to determine at the outset that the employee's consent to the settlement was voluntary and knowing." 415 U.S. at 52 n.15. How such a determination would be made was not expressly addressed by the Court; however, making such a factual determination would be no different from how District Courts decide disputed issues of fact,

through a trial where evidence is taken, or through, preliminarily, a motion for summary judgment, to determine if there are disputed issues of material fact that necessitate a trial. Here, the District Court set an evidentiary hearing, but received no evidence, making factual findings based solely on Petitioner's execution of the mediation agreement. That is insufficient to determine whether the agreement was entered into on a "voluntary and knowing" basis.

Curiously, the *Alexander* case is scrupulously followed by a line of Eleventh Circuit cases as the binding precedent of this Court. The problem is that there is a divergent line of authority from the Eleventh Circuit, which has its roots in State law, that allows District Courts to summarily enforce Title VII settlement agreements without an evidentiary hearing. This divergent line of cases renders this Court's precedent in *Alexander* vulnerable to being ignored, as it was in this case. This divergent line of authority is contrary to *Alexander* and its progeny and for that reason the judgment of the Court of Appeals must be reversed.

As discussed *supra*, *Alexander* is followed by a significant line of cases. In *Puentes v. UPS*, 86 F.3d 196 (11th Cir. 1996), the Court of Appeals identified four (4) factors that a Court must consider when determining whether or not a release was knowingly and voluntarily executed in the context of a federal employment discrimination case: 1. Plaintiff's education and business experience; 2. The amount of time the plaintiff had to consider the agreement before signing it; 3. The plaintiff's opportunity to consult with an attorney, coupled with the employer's encouragement or discouragement of attorney consultation; and 4. The consideration given in exchange for a waiver comparing

same to benefits already available to employee. *Id.* at 198. It is implicitly obvious that consideration to these factors cannot be properly given without evidence being taken, either at an evidentiary hearing, at trial, or at a minimum, by way of summary judgment.

The most critical factor in *Puentes*, and the issue that turned the tide in reversing a summary judgment for an employer at the District Court level, was the amount of time afforded to the plaintiffs, which amounted to 24 hours. In this case, the evidence from the record is uncontroverted that Petitioner was not given an opportunity to contemplate the proposed mediation agreement, since he executed same in the context of a purportedly heated and contentious mediation session. The evidence is also uncontested that Petitioner repudiated the mediation agreement on October 2, 2001, one day after its execution. Petitioner wrote to his then attorney, with a copy to the District Court, "It is my feeling that ***I hardly had a choice in the decision that I continuously and openly expressed disagreement*** of, yet you continued to negotiate [. . .] ***my true position in the matter was ignored.***" App. 12, emphasis added. At a minimum, this letter raises an issue of fact as to the voluntariness of Petitioner's action in executing the mediation agreement upon which the claimed waiver rests. Ironically, in *Puentes*, the employees agreed, to an express and unambiguous Release and Settlement Agreement, which was tendered outside the context of a confidential mediation. The plaintiffs executed the agreements, and, unlike this case, received compensation which the Court of Appeals characterized as "substantial settlement packages," and thereafter filed suit for discrimination. *Id.* at 197. The trial court granted a summary judgment based on the "release" of the claims.

Id. at 197. That decision was reversed by the Court of Appeals, and the plaintiffs in *Puentes* were permitted to proceed to trial on the merits of their claims, and the employer on the defense issue of whether they had released their claims. In other words, factual conflicts were to be resolved by a jury, not by a myopic and cursory review of a document.

As the Court of Appeals stated in *Puentes*: "If in fact the plaintiffs were only given twenty-four hours to decide whether to sign the releases, ***that was insufficient time***." *Id.* at 199, emphasis added. Here, Petitioner was not given ***any*** time to contemplate the proposed mediation agreement, and according to his letter to the District Court, was coerced by his former counsel into executing a document he did not wish to execute. In this case, there are disputed issues of fact that precluded enforcement of the "mediation agreement," since Petitioner, while still represented by his former counsel, wrote a letter to the District Court stating, in his own words, that he had not voluntarily executed the agreement and that his counsel had disregarded his wishes to go forward with the case.

The Eleventh Circuit has reaffirmed its holding in *Puentes* in the case of *Bledsoe v. Palm Beach County Soil and Water Conservation District*, 133 F.3d 816 (11th Cir. 1998), *reh'g en banc denied*, 140 F.3d 1044, *cert. denied*, 525 U.S. 826. In *Bledsoe*, a comprehensive release under the Florida Worker's Compensation laws was utilized by an employer to defeat a plaintiff's claim under the Americans With Disabilities Act (ADA). The Court of Appeals, citing to *Puentes*, rejected the District Court's disposition enforcing the claimed "settlement," because it found that there were disputed issues of fact as to whether the parties intended to settle anything more than a worker's

compensation claim. It is important to note here again that both the *Puentes* and *Bledsoe* cases were decided based on ***evidentiary submissions*** presented by way of summary judgment motions where, here, the District Court set an evidentiary hearing, then abruptly failed to receive any evidence.[1] Disputed issues of fact that appear in the face of this Record exacerbated the need for an evidentiary hearing, including: Petitioner's correspondence filed with the District Court; his refusal to execute the actual release Home Depot presented *after* the parties' mediation; and his assertions that he was pressured and coerced to settle a case he did not wish to settle on the terms presented.

Not only did the District Court (and the Court of Appeals) decline to follow the binding precedent of *Alexander* and its progeny as expressed in *Puentes* and *Bledsoe*, the error was compounded by the District Court's failure to take evidence on the factual issues necessary to make a determination on whether the agreement was entered into without coercion, as Petitioner claimed.

The District Court abused its discretion in not permitting this evidence. The case law is clear: where a party is seeking to be relieved of a claimed settlement agreement,

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[1] The case of *Wichman v. County of Volusia*, 110 F. Supp. 1354 (M.D. Fla. 1999), illustrates a proper application of *Alexander* and its progeny, including *Puentes* and *Bledsoe*. There, the District Court rejected a motion for summary judgment based on an alleged "Mediation Settlement Agreement," that contemplated future execution by the plaintiff of a subsequent agreement that was never executed, as is the case here. The District Court declined to hold, as a matter of undisputed fact, that the agreement which was executed, barred plaintiff's claim, leaving the issue to a jury determination. *Id.* at 1362.

the Court "must" conduct an evidentiary hearing. *Murchison v. Grand Cypress Hotel Corporation*, 13 F.3d 1483, 1486 (11th Cir. 1994). In *Murchison*, the settlement agreement was enforced *without* an evidentiary hearing, because the settlement agreement was read in open court, *with the plaintiff present, who did not object*, and because the agreement was specifically reviewed and approved by the District Court. In this case, the agreement was never reviewed nor approved by the District Court, nor was there a hearing to consider same; accordingly, an evidentiary hearing was warranted and necessary.

The Court of Appeals' decision in this case purported to distinguish *Murchinson*, while ignoring *Alexander* and its progeny, by stating that it was not an abuse of discretion for the District Court to decline to hold an evidentiary hearing since there was no "material factual dispute as to the existence or terms of the agreement or to the authority of the attorney to enter into settlement." Because "those disputes" were not present in this case, the Court of Appeals held, the District Court did not err in declining to take any evidence. App. 1-2. The obvious problem with this approach is that it ignores the most critical factors in considering a waiver of Title VII claims, that is, whether such a waiver was "voluntary and knowing." Under the holding of the Court of Appeals in this case, there is no room for an individual victimized by coercion to bring the issue to the District Court's attention. The result of such a rule is to completely undermine and disregard the holding of this Court in *Alexander*, and to permit a District Court to ignore complaints of coercion by narrowing the focus of the inquiry to factors other than those identified by *Alexander*, to wit, did the plaintiff sign the alleged release?

The District Court, in an attempt to justify its failure to allow for an evidentiary hearing and not follow the binding precedent of this Court, made a finding of fact that Petitioner's letters to the Court repudiate the mediation agreement "belies [Petitioner's] claimed ignorance." App. 7. Petitioner has never claimed to be "ignorant," nor is his "ignorance," or lack thereof, a relevant consideration under *Alexander* and its progeny to determine the enforceability of the agreement. Rather, Petitioner's letter of October 2, 2001 establishes that Petitioner " . . . continuously and openly expressed disagreement . . . " (during the mediation) and that he " . . . did not, and still do (sic) not agree with the terms of the agreement." App. 12. This letter was delivered to Petitioner's attorney one (1) day after the mediation and copied to the District Court. Petitioner's second letter of October 3, 2001 to his attorney, also copied to the District Court, claims the following: "During the entire mediation process, you saw how upsetting (sic) I was . . . I could not believe ***you were so contrary, and non-supportive to my interests . . . and your insistence that I sign the agreement.***" App. 13, emphasis added.

Hence, it is difficult, if not impossible, to comprehend the District Court's illogical "finding" that Petitioner's signature alongside that of his attorney is "sufficient proof that he knowingly and voluntarily agreed to the terms" of the agreement. What the letters do demonstrate is that Petitioner did not have a meaningful opportunity to confer with his counsel since his counsel had placed himself in an adversarial position to his own client. Since Petitioner asserts he was coerced into executing a document he did not wish to execute, the simple fact that his signature

appears alongside that of his counsel does not establish that he executed the document voluntarily.

The document does not speak for itself: it only establishes that Petitioner's signature was procured, not *why, how, or under what circumstances* the signature was procured. There is no evidence in this record that Petitioner "knowingly and voluntarily" executed the claimed release. In fact, Petitioner's correspondence to the District Court establishes, or at a minimum makes the claim, that his former attorney failed to abide by his wishes to ***not*** settle the case; that his attorney was acting in a manner characterized by Petitioner as "contrary" and not supportive of his interests, all of which create issues of material fact that mandate an evidentiary hearing. At a minimum, Petitioner should be given the opportunity, at an evidentiary hearing, to contest the speculative and wholly unsupported findings the District Court drew from his signature and from his letters.

Several circuits have held that District Courts must conduct evidentiary hearings where putative settlements are challenged. In *Malave v. Carney Hospital*, 170 F.3d 217 (1st Cir. 1999) an employee filed discrimination claims against her former employer and refused to sign a settlement agreement which her attorney negotiated on her behalf. *Id.* at 219. The employer moved to enforce the purported settlement and the District Court granted the motion without holding an evidentiary hearing. *Id.* The First Circuit held that federal law applies to a motion to enforce and that a trial court "may not summarily enforce a purported settlement agreement if there is a genuinely disputed question of material fact regarding the existence or terms of that agreement. In such circumstances, the cases consistently hold that the court instead ***must take***

evidence to resolve the contested issues of fact. *Id.*, emphasis added. Further, the First Circuit held in *Malave* that allegations of conflict between the party resisting settlement and his or her attorney are "fundamental" and require an evidentiary hearing:

> Even though the document that [the attorney] filed declared that he had received authority from [his client] to effectuate a $15,000 settlement, it went on to state that [the client's] son, on [the client's] behalf, had called [the attorney] within a day or two to make sure that [the attorney] understood that he did not have authority to settle the case for that sum. This recitation ought to have alerted the district court that something had gone awry, and that the extent of [the attorneys'] authority was open to question. ***We cannot conceive of a more fundamental dispute concerning the existence vel non of a settlement agreement than occurs when a litigant and her lawyer wrangle over whether the former imbued the latter with the authority to settle.***

Id. at 221, emphasis added. *See also Kulka v. National Distillers Products Company*, 483 F.2d 619 (6th Cir. 1973); *Autera v. Robinson*, 419 F.2d 1197 (D.C. Cir. 1969); *Petty v. Timken Corp.*, 849 F.2d 130 (4th Cir. 1988). *But see Stewart v. M.D.F., Inc.*, 83 F.3d 247 (8th Cir. 1996) (no evidentiary hearing necessary for motions to enforce settlement agreements).

In *Callie v. Near*, 829 F.2d 888 (9th Cir. 1987), the Ninth Circuit also reversed a District Court for summarily enforcing a settlement agreement without holding an evidentiary hearing, concluding that "[w]here material facts concerning the existence ***or terms*** of an agreement to

settle are in dispute, the parties must be allowed an evidentiary hearing." *Id.* at 890. The challenges to the settlement agreement in *Callie* are similar to those Petitioner raised. In *Callie*, as in this case, the party resisting settlement argued that settlement was contingent upon execution of a stipulation and judgment, neither of which were executed. *Id.* at 890. Similarly, in this case, the mediation agreement was contingent upon the execution of the "Settlement Agreement and Full and Final General Release," which Petitioner never executed.

Since there are divergent lines of authority within the Eleventh Circuit, and since other circuits disagree with the holding in this case, this Court should resolve those differences.

II. FEDERAL LAW GOVERNS ENFORCEABILITY OF SETTLEMENTS IN TITLE VII CASES

The District Court also erred in applying State law to determine if the agreement could be enforced, since that is a matter to be decided under federal law pursuant to the holding of *Alexander.* The Eleventh Circuit ignored this issue, but specifically relied upon a case that applies State law to determine whether or not a settlement agreement may be enforced. There is no suggestion in the language of Title VII that federal courts are bound by State common law on substantive issues, nor is there any case from this Court that suggests so. While the Court of Appeals declined to review this issue, its own case, *Eatmon v. Bristol Steel & Iron Works, Inc.*, 769 F.2d 1503, 1516-17 (11th Cir. 1985), holds that federal common law should be used to

determine the scope and validity of settlement agreements in Title VII cases.[2]

Other circuits have held that federal law applies where parties dispute the enforceability of settlement agreements in federal court. In *Malave v. Carney Hospital*, 170 F.3d 217 (1st Cir. 1999), the First Circuit held, in an employment discrimination case, that:

> A party to a settlement agreement may seek to enforce the agreement's terms when the other party reneges. If, at the time of the claimed breach, the court case already has been dismissed, the aggrieved party may bring an independent action for breach of contract. If, however, the settlement collapses before the original suit is dismissed, the party who seeks to keep the settlement intact may

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[2] There is authority from the Court of Appeals that runs counter to *Eatmon* and holds that Title VII settlement agreements should be evaluated under State law. This line of authority usually results in summary enforcement of claimed releases. *See, Hayes v. National Service Industries*, 196 F. 3d 1252 (11th Cir. 1999) (applying Georgia law to enforceability of Title VII settlement under "apparent authority" doctrine). However, since *Eatmon is contrary to Hayes*, the latter has dubious value as precedent since it is contrary to the "prior precedent rule." *See, Smith v. GTE Corporation*, 236 F.3d 1292 (11th Cir. 2001) ("Under the well-established prior panel precedent rule of this Circuit, the holding of the first panel to address an issue is the law of this Circuit, thereby binding all subsequent panels unless and until the first panel's holding is overruled by the Court sitting en banc or by the Supreme Court."). The *Hayes* case did not overrule, nor could it overrule *Eatmon*, since *en banc* consideration would be required. Without explaining why State common law would govern a cause of action based on federal law, *Hayes* has nevertheless found a place in the jurisprudence of the Court of Appeals. *See, Resnick v. Uccello Immobilien GMHB*, 227 F. 3d 1347, 1349 (11th Cir. 2000) (citing *Hayes* for the proposition that State law governs enforcement of settlement agreements made pursuant to the ADA).

> file a motion for enforcement. In a federal court, such a motion – at least when the underlying cause of action is federal in nature – is determined in accordance with federal law.

Malave v. Carney Hospital, 170 F.3d at 220 (internal citations omitted).

The State law cases the District Court relied upon were far afield. The District Court relied principally on *Sav-A-Stop v. Jaydon, Inc.*, 124 B.R. 356 (M.D. Fla. 1991), a bankruptcy case that did not involve a federal employment discrimination claim. *Sav-A-Stop* was wholly inapplicable to the facts here in that the party seeking to enforce the agreement had performed fully, and said performance had been accepted by the party seeking to avoid payment. *Id.* at 359. In this case, payment of the sum contemplated by the mediation agreement was never tendered, nor accepted. Because performance had occurred in *Sav-A-Stop*, and had been accepted, the party opposing enforcement of the payment portion of the agreement, was estopped from voiding the deal. *Id.* at 360. Again, the holding was premised on principles derived from State law, because State law claims were at issue, and there was no need to apply any federal statute, as in this case.

The other even more marginal cases cited by the District Court, *Worthy v. McKesson Corp.*, 756 F.2d 1370 (8th Cir. 1985) and *Robbie v. City of Miami*, 469 So. 2d 1384 (Fla. 1985) are inapplicable because: (1) the holdings are contrary to *Alexander*; (2) they are from jurisdictions that were clearly not binding on the District Court; and (3) the *Robbie* case is not an employment case, where a waiver of federal rights was at stake.

Because the Eleventh Circuit has drifted from its prior adherence to federal common law governing issues of enforcement of settlement under Title VII, and that drift is at odds with other circuits, it would be of enormous assistance to litigants for this Court to reiterate that federal law governs claimed waivers of federal rights as *Alexander* implicitly suggests.

CONCLUSION

Petitioner respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-11964
Non-Argument Calendar

D.C. Docket No. 00-08757-CV-WDF

NATHAN MOORE,

Plaintiff-Appellant,

versus

HOME DEPOT,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

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(Filed Oct. 4, 2002)

Before BLACK, CARNES, and MARCUS, Circuit Judges.

PER CURIAM:

Nathan Moore appeals the district court's order enforcing a settlement agreement between Moore and his former employer, Home Depot.

On August 18, 2000, Moore filed a complaint against Home Depot alleging racial and age discrimination. Moore and Home Depot then participated in two days of mediation,

during which Moore was represented by counsel, in an attempt to settle the claims. At the end of the second day, the parties entered into a confidential, handwritten settlement agreement. Moore, his attorney, and a Home Depot representative all signed the agreement, which provided for the later execution of a formal general release and settlement agreement that would incorporate all the terms contained in the handwritten agreement. Subsequently, contending that the settlement terms were unfavorable to him, Moore refused to sign the later formal agreement and repudiated the settlement. Without holding an evidentiary hearing, the district court granted Home Depot's motion to enforce the settlement, and Moore now appeals.

We review a district court's decision to enforce a settlement agreement without an evidentiary hearing only for an abuse of discretion. *Murchison v. Grand Cypress Hotel Corp.*, 13 F.3d 1483, 1485 (11th Cir. 1994). Moore first contends that the district court erred by failing to hold an evidentiary hearing before enforcing the settlement. To the contrary, "[a] number of courts have recognized the authority of a trial court to summarily enforce a settlement agreement without an evidentiary hearing." *Id.* at 1486. In *Murchison*, we stated that a district court must hold an evidentiary hearing before enforcing a settlement if there is a material factual dispute as to the existence or terms of the agreement or to the authority of the attorney to enter into the settlement. *Id.* Because those disputes were not present in that case, we affirmed the district court's decision to enter final judgment on the settlement agreement without an evidentiary hearing. *Id.* at 1487. Similarly, in this case, neither of those disputes is present,

so the district court did not err by declining to hold an evidentiary hearing.

Second, Moore contends that the settlement agreement was invalid as to his age discrimination claim because it failed to meet the requirements of the Older Workers Benefit Protection Act. Specifically, Moore contends that under 29 U.S.C. § 626, all agreements waiving rights under the act must provide for a seven-day period in which the claimant can revoke the settlement agreement. This contention fails, however, because the seven-day revocation period requirement is inapplicable to waivers "in settlement of a charge filed with the Equal Employment Opportunity Commission, *or an action filed in court by the individual. . . .* " 29 U.S.C. § 626(f)(2) (emphasis added). Here, Moore filed an action in court, so the seven-day revocation period does not apply.[1]

AFFIRMED.

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[1] Moore does not argue that any of the other restrictions contained in the Older Workers Benefit Protection Act are applicable in this case, and issues not raised on appeal are deemed waived. *Marek v. Singletary*, 62 F.3d 1295, 1298 n.2 (11th Cir. 1995) ("Issues not clearly raised in the briefs are considered abandoned.").

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NATHAN MOORE, Case No. 00-8757-CIV-FERGUSON

Plaintiff,

vs.

HOME DEPOT,

Defendant.

_____/

ORDER ON DEFENDANT'S MOTION TO ENFORCE SETTLEMENT

THIS CAUSE is before the Court upon the Defendant's Motion to Enforce the Settlement Agreement [D.E. 58].

FACTS

On October 1, 2001, Plaintiff Nathan Moore, and Defendant Home Depot, attended a mediation conference in an effort to resolve an employment discrimination conflict. Both parties, represented by counsel, signed a confidential, handwritten settlement agreement indicating the parties' mutual intent to resolve the dispute. The parties further agreed to later execute a formal general release and settlement agreement which would incorporate all the terms contained in the handwritten agreement. Believing that the case was settled, both the mediator, Steven A. Mayans, and Home Depot filed notices of settlement with this Court in early October. Relying upon both the Mediator's Report and Home Depot's Notice of Settlement, this Court dismissed the case on October 4,

2001 and "retain[ed] jurisdiction . . . to enforce the settlement."

After dismissing the case, the Court received copies of Moore's October 2, 2001 and October 3, 2001 letters to his attorney requesting that the mediation agreement be rescinded based on Moore's discontent with the agreed upon terms and the mediation process. Moore further asserted that he lacked the ability to understand the agreement so as to make a rational decision. After Moore refused to execute a more formal settlement agreement on October 4, 2001, Home Depot filed this motion to enforce the settlement agreement reached between the parties on October 1, 2001.

ISSUE

The issue now before the Court is whether an agreement made at mediation is lacking in effect where it (1) purports to settle a claim; (2) contains all the elements of a contract; (3) is signed by the Plaintiff and his counsel; and (4) contemplates the execution of a future more formal agreement.

DISCUSSION

Moore argues that the settlement agreement he signed on October 1, 2001, which contemplated the execution of a more formal agreement, is not enforceable because he never executed the final version entitled "Settlement Agreement and Full and Final General Release."

In *Save-A-Stop, Inc. v. Jaydon*, 124 B.R. 356, 359 (M.D. Fla. 1991), the court found that settlement agreements are construed under the law as contracts and the fact that an agreement may provide for a later more specific agreement does not affect the enforceability of the original agreement. The court further noted that such a contract is not lacking in effect merely because "it expresses the idea that something is left to a future agreement and such an agreement to agree is simply an agreement *in praesenti* to do it." *Id.* (citations omitted). Therefore, an agreement to agree is enforceable where it is sufficiently specific to be capable of implementation, and where all the essential elements are set forth. *Id.*

In this case, the parties' October 1, 2001 agreement executed at the mediation conference states "[t]he parties agree to execute a formal General Release and Settlement Agreement which incorporates all of the terms contained in this handwritten agreement". Pursuant to *Jaydon*, the parties' agreement to make the agreement more formal after its initial execution does not affect the enforceability of the original agreement. *Id.* Furthermore, "[s]ettlement agreements are highly favored by courts of law as public policy favors the efficiency and mutual benefit of compromise and thus will usually be enforced". *Id.* Because all the essential terms had been agreed to, the settlement between Moore and Home Depot is enforceable.

In his attempt to rescind the settlement agreement Moore also argues that although he executed the contract, there was no meeting of the minds because he neither had the capacity to read the agreement objectively, or the ability to make a rational decision.

Robbie v. City of Miami, 469 So. 2d 1384 (Fla. 1985), addressed the necessary intention of parties when forming a valid contract. Using an objective standard to determine whether a contract is enforceable, the court in *Robbie* stated "the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs – not on the parties having meant the same thing but on their having said the same thing." *Id.* at 1385 (citations omitted). Even if incapacity is an exception to the *Robbie* rule, there is not a scintilla of evidence that Moore lacked the ability to understand. In fact his written *pro se* protestations to the Court[1], before hiring new counsel, belies his claimed ignorance. Moore's signing of the simple agreement at the mediation conference, accompanied by his attorney's execution, is sufficient proof that he knowingly and voluntarily agreed to the terms. Given Moore's opportunity to consult with his attorney at the mediation conference had he experienced difficulty understanding the terms, his subsequent expression of dissatisfaction came too late.

Similarly in *Worthy v. McKesson Corp.*, 756 F.2d 1370, 1372 (8th Cir. 1985), an employee's assent to settle all claims of alleged employment discrimination was found to be knowing and voluntary, and thus barred his attempts to rescind the settlement agreement simply because he later thought it to be unsatisfactory. The employee in *Worthy*, like Moore, agreed to accept his employer's offer to settle all claims. The employer assumed the responsibility

[1] Copies of the two letters Moore sent to his former counsel, which he also submitted to the Court, are now part of the record along with a copy of the parties' October 1, 2001 settlement agreement.

of preparing formal documents and all trial preparation ceased. *Id.* A few days later, the employee requested that his attorney continue with trial preparations despite the settlement agreement. *Id.* The court found that the employee was trying to rescind an otherwise voluntary agreement because he felt the settlement was paltry. *Id.* at 1373. The court further noted that if a party to a suit who has previously authorized a settlement changes his mind . . . , that party remains bound by the terms of the agreement. *Id.*

Similar to the plaintiff in *Worthy*, Moore, with his attorney at his side, knowingly and voluntarily agreed to the terms of the agreement, and manifested his intention through his execution of the agreement, thus he is bound to the terms of the agreement. Therefore it is hereby

ORDERED AND ADJUDGED that the Defendant's Motion to Enforce the Settlement Agreement [D.E. 58] is **GRANTED in part, DENIED in part.** Accordingly, Plaintiff shall execute a general release in favor of the Defendant within twenty (20) days of the date of this Order. The Defendant's request for attorneys' fees and costs incurred in the filing of its Motion to Enforce the Settlement Agreement is denied.

DONE AND ORDERED in Chambers at Ft. Lauderdale, Florida, this 31st day January, 2002.

/s/ Wilkie D. Ferguson, Jr.
WILKIE D. FERGUSON, JR.
UNITED STATES
DISTRICT JUDGE

copies provided:
Patricia Lowry, Esq.
Jacob Rose, Esq.(courtesy)
Isidro Garcia, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NATHAN MOORE,

Plaintiff,

CASE NO.: 00-8757-FERGUSON
Magistrate Judge Snow

v.

HOME DEPOT USA, INC.,

Defendant.

_____/

Denied

Wilkie D. Ferguson, Jr.

3/21/02

PLAINTIFF'S MOTION FOR REHEARING OR TO ENTER FINAL JUDGEMENT AND TO STAY FINAL JUDGMENT PENDING APPEAL AND INCORPORATED MEMORANDUM OF LAW

(Filed Mar. 21, 2002)

Plaintiff, NATHAN MOORE, through counsel, moves for rehearing of the Court's order enforcing the mediation agreement, or, if said motion is denied, for entry of a final judgment which can be appealed, and for stay of said final judgment until appellate remedies are exhausted, and would show in support:

1. By order rendered January 31, 2002, the Court granted Defendant's Motion to Enforce Settlement.

2. The Court declined to take any evidence of the circumstances relating to plaintiff's claim of coercion by his former counsel (Jacob Rose) at said mediation, or take testimony of the reasons Mr. Rose may have had to coerce his client into entering into such an agreement (claimed mental incapacity during at least a portion of the period in which this case was pending). Plaintiff was prepared to put this evidence on at the evidentiary hearing the Court

had scheduled, and Mr. Rose was present for said hearing and available to testify on the issue.

October 2, 2001

Nathan Moore
3959 Harwood St.
Lake Park, Florida 33403

Jacob A. Rose
Attorney at Law

RE: REQUEST TO RESCIND MEDIATION AGREEMENT
Case No. 00-8757-CIV-FERGUSON

Dear Mr. Rose, Esq.

After giving thought to the mediation agreement that we signed yesterday October 1, 2001, in the civil suit against Home Depot, as you are aware of, I did not, and still do not agree with the terms of the agreement. It is my feeling that I had hardly a choice in the decision that I continuously and openly expressed disagreement of, yet you continued to negotiate. Furthermore, I feel that my interest of continuing with the civil suit against Home Depot was not considered being that my true position in the matter was ignored.

Please accept this letter as a request to rescind the mediation agreement and to go forward with the civil suit already in progress.

Thank You,

/s/ Nathan Moore
Nathan Moore

Cc: Judge Wilke D. Ferguson
Case File

October 3, 2001

Nathan Moore
3959 Harwood St.
Lake Park, Florida 33403

Jacob A. Rose
Attorney at Law
Via: Fax, Hand Delivery

RE: SECOND REQUEST TO RESCIND MEDIATION AGREEMENT
Case No. 00-8757-CIV-FERGUSON

Dear Mr. Rose, Esq.

As I stated in my first request to rescind the mediation agreement that we signed on October 1, 2001 in the civil lawsuit against Home Depot, I disagree with the terms of this agreement. In fact, I am very upset with the manner in which this entire mediation process took place. This was one of the most traumatic encounters I have I [sic] ever experienced.

Firstly, I have been very honest and up front with you and I am relying on you to be the same with me. During the entire mediation process, you saw how upsetting [sic] I was, and how I outwardly expressed my discontentment. You know how strongly I feel about my experiences with Home Depot, thus this case. Secondly, I could not believe you were so contrary, and non-supportive to my interests surrounding the many issues of the case, and your insistence that I sign the agreement. To say the least, your actions were very discouraging for the cause of which I have sought your services.

Lastly, I read the agreement today for the first time and found the terms and conditions to be unbelievable. Once you looked over the handwritten document that the

opposing counsel drafted, none of these terms and conditions were discussed or explained to me. The only discussion was the dollar amount, which was being negotiated. Considering the state of mind I was in at that time, I strongly believe this should have occurred. Nevertheless, I do not believe that I was mentally capable of reading over the agreement objectionably or making a rational and intelligent decision.

Please accept this letter as a request to rescind the mediation agreement of October 1, 2001, based on my emotional and mental disposition.

Thank You,

/s/ Nathan Moore
Nathan Moore

Cc: Judge Wilke D. Ferguson, Jr.
Case File
See: VA Medical File

SUPREME COURT, U.S.
FILED
MAR 6 2003
OFFICE OF THE CLERK

No. 02-1137

IN THE

Supreme Court of the United States

NATHAN MOORE,

Petitioner,

v.

HOME DEPOT U.S.A., INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

A. Whether the decision of the Court of Appeals for the Eleventh Circuit in this case holding that an evidentiary hearing is not required when the existence and/or terms of a settlement agreement are not in dispute is in conflict with *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011 (1974).

B. Whether the Eleventh Circuit's affirmance of the district court's application of state contract law to the enforceability of a settlement agreement is in conflict with *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011 (1974).

RULE 29.6 STATEMENT

Respondent, Home Depot U.S.A., Inc., has the following parent companies: Home Depot International, Inc. and The Home Depot, Inc. No publicly held company owns 10% or more of its stock.

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2. The Eleventh Circuit's opinion does not conflict with any other circuit precedent; application of either state or federal law to the enforcement of the settlement agreement would not change the outcome here. 18

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STATEMENT OF THE CASE

On March 1, 2001, Petitioner filed his Amended Complaint which included the following counts: "Count I - Race Discrimination in Violation of Title VII of the Civil Rights Act of 1991;" "Count II - Race Discrimination in Violation of Florida Civil Rights Act F.S. 760.10 and Section 1981 of Civil Rights Act of 1891"; and "Count III - Retaliation Florida Whistleblower Act F.S. 448." R19. On May 9, 2001, Respondent filed its Motion to Dismiss Amended Complaint. R34. Before any order being entered on Respondent's Motion to Dismiss Amended Complaint, on July 24, 2001, Petitioner filed his Second Amended Complaint which contained the following counts: "First Claim for Relief - Disparate Treatment, 42 U.S.C. § 1981/ Title VII" and "Second Claim for Relief - Retaliation, 42 U.S.C. § 1981/Title VII". R42. In response, on August 15, 2001, Respondent filed its Motion to Strike Or Alternatively To Dismiss Second Amended Complaint. R47.

On September 27, 2001, the parties attended mediation which continued on October 1, 2001. R51; R55; R57; R66. Present during both days of mediation were the following individuals: Petitioner; Petitioner's former counsel, Jacob Rose; John Schiller, corporate representative of Respondent; Patricia E. Lowry and David I. Spector, counsel for Respondent; and Mediator Steven Mayans. R55; R57. The mediation was continued from September 27, 2001 to October 1, 2001 because Petitioner claimed that a crucial piece of evidence, the affidavit of Kelvin Polk, was in the process of being obtained and would be available for review by Respondent by October 1, 2001. R68, p. 9. After obtaining the affidavit of Kelvin Polk, and at the conclusion of the second day of mediation, both parties and their counsel —

including Petitioner and his counsel Jacob Rose — executed the Mediation Settlement Agreement. R55; R57; R66. The Mediation Settlement Agreement contained all of the material terms of the settlement reached at mediation. R66. In addition to other material terms, the Mediation Settlement Agreement signed by Petitioner included an agreement by the parties to execute a formal Settlement Agreement and Full and Final General Release which incorporates all of the terms contained in the Mediation Settlement Agreement. R66. Respondent immediately advised the district court of the settlement by filing its Notice of Settlement on October 3, 2001. R55.

On October 4, 2001, the district court entered its Order Dismissing Cause Upon Notice of Settlement and dismissed the case without prejudice. R56. The district court retained jurisdiction for sixty (60) days to enter judgment or final order of dismissal, and if necessary, to enforce settlement. R56. On October 9, 2001, the mediator filed his Mediation Report also reporting that the conflict had been resolved completely. R57.

Subsequent to the mediation, Petitioner apparently wrote two letters, one dated October 2, 2001 and another dated October 3, 2001, to his counsel and apparently also sent copies to the district court, requesting that the settlement agreement which he signed be rescinded. R66. Counsel for Respondent received copies of these letters only after they were forwarded to Respondent by Petitioner's then counsel Jacob Rose with a letter from Rose dated October 3, 2001. R58. Petitioner's letter dated October 2, 2001 unequivocally states that he signed the Mediation Settlement Agreement. R66.

On October 30, 2001, after Petitioner refused to execute the subsequently drafted typewritten Settlement Agreement and Full and Final General Release, Respondent filed its Motion to Enforce Settlement Agreement ("Motion to Enforce"). R58. The district court set a hearing on the motion to enforce initially for November 29, 2001, which hearing was then rescheduled on December 14, 2001. R59. Before the hearing, Petitioner retained new counsel, Isidro Garcia, who filed his Notice of Appearance on December 5, 2001. R61. Two days before the December 14, 2001 hearing, and 28 days after a response was due pursuant to the Local Rules for the Southern District of Florida, Petitioner filed a response in opposition to the motion to enforce. R63.

The parties and their counsel appeared before the district court on December 14, 2001 and argued the motion to enforce. R64. The district court requested, and was provided with, a copy of the Mediation Settlement Agreement during the hearing. No objection was raised by Petitioner or his counsel. R68, pp. 8-9. The district court correctly held that settlement agreements are construed under the law as contracts and the fact that an agreement may provide for a later more specific agreement does not affect the enforceability of the original agreement. R65, pp. 2-3. The district court also correctly found, based on the settlement agreement in the record and Petitioner's letters to the court, that Petitioner, with his attorney at his side, knowingly and voluntarily agreed to the terms of the Mediation Settlement Agreement and manifested his intention through his execution of the agreement. R65, p. 4. The district court granted the Motion to Enforce and ordered Petitioner to execute a general release in favor of Respondent within twenty (20) days of the order. R65, p. 4. On February 5, 2002, Petitioner filed his Motion for Rehearing in which

he sought to be given an opportunity at an evidentiary hearing "to contest the speculative findings the Court has drawn from [Petitioner's] signature and from [Petitioner's] letter to the Court." R67. In the alternative, Petitioner requested that the district court enter a final judgment and a stay of said final judgment until Petitioner's appellate remedies were exhausted. R67. The district court denied Petitioner's request on March 21, 2002. R70.

On appeal, the Eleventh Circuit determined that the district court did not err in enforcing the handwritten settlement agreement without an evidentiary hearing. In reaching this conclusion, the Eleventh Circuit relied on existing circuit precedent, *Murchison v. Grand Cypress Hotel Corp.*, 13 F.3d 1483 (11th Cir. 1994), which holds that only when the existence or terms of the settlement agreement or the authority of the attorney to enter into the settlement agreement are in dispute must the district court hold an evidentiary hearing. *Id.* at 1485. The Eleventh Circuit also rejected Petitioner's argument that the agreement was invalid as to any age discrimination claim based upon an alleged failure to meet the requirements of the Older Workers Benefit Protection Act ("OWBPA") because the seven-day revocation period found in the OWBPA is inapplicable to a settlement of an action filed in court. 29 U.S.C. § 626(f)(2). Petitioner has not raised the application of the OWBPA in his Petition before this Court.

REASONS FOR DENYING THE PETITION

Petitioner seeks a Writ of Certiorari to review the decision of the Eleventh Circuit dated October 4, 2002. As an initial point, the opinion was per curiam and unpublished. Pursuant to Rule 36-2 of the Eleventh Circuit Rules, the opinion therefore has no precedential value. As a result, the Eleventh Circuit's opinion could not conflict with any other decision as a matter of law.

Further, the opinion contains no discussion of whether federal or state law controls the interpretation of settlement agreements. Thus, the Eleventh Circuit's unpublished opinion is not in conflict with an opinion of any court which addresses this topic. Indeed, the Eleventh Circuit can affirm a district court's decision on any ground, including the application of a standard different than that applied by the district court. *Benanni Ship Supply, Inc. v. United States*, 459 F.2d 1558, 1561 (11th Cir. 1992). *See also Thigpen v. Roberts*, 468 U.S. 27, 29-30, 104 S. Ct. 2916, 2918 (1984) (Supreme Court may affirm on any ground that the law and the record permit). Thus, the affirmance of the decision in this case may in fact have been premised upon the application of federal law. Indeed, the result is the same under either standard, state or federal. Because the opinion does not specify the standard employed, it is impossible to articulate the Eleventh Circuit's basis for its affirmance regarding the enforceability of the Settlement Agreement. Therefore, the Eleventh Circuit's opinion does not create a conflict below.

Conflicts giving rise to a grant of certiorari must be "square" and "real." *See Greco v. Orange Mem'l Hosp. Corp.*, 433 U.S. 1001, 96 S. Ct. 433 (1975) (denying certiorari) (White, J., dissenting); *Beaulieu v. United States*, 497 U.S.

1038, 1039, 110 S. Ct. 3302, 3303 (1990) (denying certiorari) (White, J., dissenting). A conflict purportedly created by an opinion cannot be "square" or "real" when the opinion contains no language conflicting with any other opinion. As a result, the Eleventh Circuit's opinion here does not create a conflict upon which certiorari is appropriate.

For these reasons as set forth below, the Petition should be denied.

A. The Eleventh Circuit Opinion Does Not Conflict With *Alexander v. Gardner-Denver Co.*

1. The Eleventh Circuit's decision allowing enforcement of the settlement agreement without a hearing does not conflict with *Alexander*.

As the first issue presented, Petitioner argues that the Eleventh Circuit's determination that the district court did not commit error by failing to conduct an evidentiary hearing is in conflict with this Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011 (1974).[1] Petitioner is incorrect.

In *Alexander*, the petitioner claimed that his discharge violated the terms of a collective bargaining agreement. *Alexander*, 415 U.S. at 36. Pursuant to the terms of the collective bargaining agreement, a binding arbitration was held. *Id.* Before the arbitration, petitioner filed a charge of racial discrimination with the Colorado Civil Rights Commission, which charge was referred to the EEOC. *Id.* During the arbitration, the petitioner testified that his discharge was the result of racial discrimination and informed

1. *Alexander* is the only opinion of this Court Petitioner claims conflicts with the Eleventh Circuit's decision.

the arbitrator of the pending charge. *Id.* at 42. The arbitrator ruled that the petitioner had been discharged for just cause and made no reference to the claim of racial discrimination. *Id.* at 42-43. Six months after the arbitrator's decision, the EEOC determined that there was no reasonable cause to believe a violation of Title VII had occurred and the petitioner then filed his lawsuit. *Id.* at 43. The district court held that the claim of racial discrimination had been submitted to the arbitrator and the petitioner was therefore bound by the arbitral decision and precluded from suing under Title VII. *Id.* The Supreme Court disagreed and held that the employee was permitted to pursue fully both his remedy under the grievance-arbitration clause of a collective bargaining agreement and his cause of action under Title VII. *Id.* at 59-60.

Mr. Alexander never executed a settlement agreement nor was there any hearing to evaluate the validity and enforceability of a settlement agreement. As Justice Powell explained, the issue before the Court was "under what circumstances, if any, an employee's statutory right to a trial de novo under Title VII may be foreclosed by prior submission of his claim to final arbitration under the nondiscrimination clause of a collective-bargaining agreement." *Id.* at 38. Simply put, the issue presented in the *Alexander* case and the issues presented in this controversy are entirely different.

Petitioner argues that the Eleventh Circuit conflicts with dictum[2] contained in footnote fifteen (15) of the *Alexander* decision.

> In this case petitioner and respondent did not enter into a voluntary settlement agreement expressly conditioned on a waiver of petitioner's cause of action under Title VII. In determining the effectiveness of any such waiver, a court would have to determine at the outset that the employee's consent to the settlement was voluntary and knowing. In no event can the submission to arbitration of a claim under the nondiscrimination clause of a collective-bargaining agreement constitute a binding waiver with respect to an employee's rights under Title VII.

Alexander, 415 U.S. at 52 n.15. The footnote deals with a hypothetical situation the circumstances of which are not described in detail. The footnote also does not state nor even suggest that an evidentiary hearing is required under all circumstances when enforcing a settlement agreement. Notably, Petitioner has failed to cite a single authority interpreting footnote fifteen (15) to mean that an evidentiary hearing must be conducted in all circumstances. As a result, no conflict exists between the Eleventh Circuit's opinion and this Court's decision in *Alexander*.[3]

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2. The United States Court of Appeals, District of Columbia Circuit, recently held that footnote fifteen (15) was "dictum." *Makins v. District of Columbia*, 277 F.3d 544, 547 (D.C. Cir. 2002).

3. As discussed *infra*, Petitioner cites *Kukla v. National Distillers Prods. Co.*, 483 F.2d 619 (6th Cir. 1973); *Autera v. Robinson*, (Cont'd)

2. The Eleventh Circuit's affirmance of the district court's application of state contract law is not in conflict with *Alexander*.

As the second issue presented, Petitioner argues that the Eleventh Circuit erred in affirming the district court's ruling, because the district court held that state law controlled the interpretation of the settlement agreement Petitioner signed. Petitioner argues that this determination also conflicts with footnote fifteen (15) of the *Alexander* decision. Once again, Plaintiff's argument is misplaced.

The Eleventh Circuit's opinion here does not address the issue of whether federal or state law controlled the interpretation of the settlement agreement. Even had the Eleventh Circuit expressly adopted the holding of the district court, it would not create a conflict with footnote fifteen (15) for which certiorari would be appropriate. In addition to footnote fifteen (15) being "dictum," the Court in *Alexander* was addressing whether a labor-management arbitration precluded a subsequent Title VII action. *Alexander*, 415 U.S. at 43; *See Makins v. District of Columbia*, 277 F.3d 544, 547 (D.C. Cir. 2002). As the District of Columbia Circuit stated when addressing footnote 15, "[t]he Court's remarks about settlements, contained in a footnote not citing any authority, can hardly be taken as representing its considered judgment that state law should not be adopted in Title VII cases."

(Cont'd)

419 F.2d 1197 (D.C. Cir. 1969); *Petty v. Timken Corp.*, 849 F.2d 130 (4th Cir. 1988); and *Stewart v. M.D.F., Inc.*, 83 F.3d 247 (8th Cir. 1996) for the proposition that an evidentiary hearing was required. None of these cases cite footnote fifteen (15) of the *Alexander* decision. Moreover, each of these cases are consistent with the Eleventh Circuit's opinion in this case and support Respondent's position.

Makins, 277 F.3d at 547. The District of Columbia Circuit then proceeded to apply state law to the enforcement of a Title VII settlement agreement. *Makins*, 277 F.3d at 549.

Petitioner's assertion that footnote fifteen (15) mandates that state contract law be disregarded when evaluating the enforceability of a settlement agreement is misplaced. Even if footnote fifteen (15) was not dictum, it does not require a lower court to disregard longstanding jurisprudence applying state contract principles to settlement agreements waiving Title VII claims. Of the 4,159 cases which cite *Alexander*, Respondent has not found a single court that has interpreted footnote fifteen (15) in such a fashion. In a recent opinion regarding the execution of a settlement agreement after litigation was commenced, the Eleventh Circuit rejected the application of the knowing and voluntary standard "instead of (or in addition to) traditional contract principles established in state law when deciding whether to enforce settlements involving Title VII claims." *Hayes v. National Serv. Indust.*, 196 F.3d 1252, 1254 (11th Cir. 1999). The inclusion of the parenthetical language "or in addition to" reflects the position of the Eleventh Circuit that under certain circumstances, traditional contract principles and the "knowing and voluntary" standard may co-exist. *See also Ridge v. Runyon*, 97 F. Supp. 760, 764 (E.D.N.Y. 1997) (Even courts which apply general contract principles to settlement agreements consider other factors typically considered under an application of the "knowing and voluntary" standard.). As a result of such recognized coexistence, there is no conflict here that warrants the granting of certiorari.

B. The Eleventh Circuit Opinion Does Not Conflict With Existing Circuit Precedent.

1. The Eleventh Circuit's decision allowing enforcement of the settlement agreement without a hearing does not conflict with existing circuit precedent.

In support of his argument that an evidentiary hearing was required, Petitioner cites *Murchison v. Grand Cypress Hotel Corp.*, 13 F.3d 1483, 1486 (11th Cir. 1994). *See* Petition For Writ of Certiorari, page 9. *Murchison* is the same case that the Eleventh Circuit cited in this case. The Eleventh Circuit expressly rejected Petitioner's interpretation that *Murchison* requires an evidentiary hearing:

> In *Murchison*, we stated that a district court must hold an evidentiary hearing before enforcing a settlement if there is a material factual dispute as to the existence or terms of the agreement or to the authority of the attorney to enter into the settlement. *Id.* Because those disputes were not present in that case, we affirmed the district court's decision to enter final judgment on the settlement agreement without an evidentiary hearing. *Id.* at 1487. Similarly, in this case, neither of those disputes is present, so the district court did not err by declining to hold an evidentiary hearing.[4]

4. Petitioner has raised no dispute regarding either the existence or the terms of the executed settlement agreement — nor is there a dispute. Nor has he, or can he, raise a material dispute about the authority to enter into the agreement — it is undisputed that Petitioner signed the agreement himself, thereby indicating his own approval.

(Cont'd)

In *Murchison*, the parties announced a settlement agreement in open court and the court subsequently entered an order of dismissal. *Murchison*, 13 F.3d at 1484. Unhappy with the settlement, Murchison filed a motion to vacate the order of dismissal and the defendant filed a motion to enter final judgment pursuant to the settlement agreement. *Id.* The district court denied Murchison's motion and granted the defendant's request. *Id.* Identical to the decision reached by the Eleventh Circuit here, the court held that an evidentiary hearing is required only when the existence or terms of the agreement or the authority of the attorney to enter into the settlement is in dispute. *Id.* As a result, the Eleventh Circuit's opinion here does not conflict with *Murchison.*

Petitioner erroneously claims that enforcement of the settlement agreement without an evidentiary hearing conflicts with *Puentes v. UPS*, 86 F.3d 196 (11th Cir. 1996); and *Bledsoe v. Palm Beach*, 133 F.3d 816 (11th Cir. 1998). *See* Petition For Writ of Certiorari, page 11. The factual scenario presented here and the scenarios presented in *Puentes* and *Bledsoe* are completely different. In *Puentes*, the court determined that it could not summarily enforce the agreement because the plaintiff was not represented by counsel at the time of execution, was forced to execute it in the context of a termination and was given only twenty-four hours to execute the document. *Puentes*, 86 F.3d at 197. None of those facts are present here.

In *Bledsoe*, a dispute arose over the scope and terms of an agreement executed in connection with a pending worker's

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(Cont'd)

Thus, Petitioner's contention that *Murchison* holds that when a party is seeking to be relieved of a claimed settlement agreement the Court must conduct an evidentiary hearing is simply wrong.

compensation action. *Bledsoe*, 133 F.3d at 819, 820. Consistent with *Murchison*, an evidentiary hearing was required only because there was a dispute over the terms of the agreement. As a result, no conflict exists.[5]

2. The Eleventh Circuit's affirmance of the district court's application of state contract law does not conflict with existing Eleventh Circuit precedent.

In support of Petitioner's second argument that federal, not state law, controls the enforcement of a settlement agreement in a Title VII action, he claims the Eleventh Circuit's opinion conflicts with existing Eleventh Circuit precedent of *Puentes v. UPS*, 86 F.3d 196 (11th Cir. 1996); *Bledsoe v. Palm Beach County*, 133 F.3d 816 (11th Cir. 1998); *Wichman v. County of Volusia*, 110 F. Supp. 1354 (M.D. Fla. 1999); and *Eatmon v. Bristol Steel & Iron Works, Inc.*, 769 F.2d 1503 (11th Cir. 1985). Petitioner's argument is again misplaced.

Again, the Eleventh Circuit made no such holding here. Even had the opinion below addressed the Petitioner's second issue and held that state law controlled, no conflict would exist. In *Puentes*; *Bledsoe*; and *Wichman*, the plaintiffs each executed a waiver contained in a settlement agreement *before* the commencement of litigation involving Title VII. *Puentes*, 86 F.3d at 197; *Bledsoe*, 133 F.3d at 818; *Wichman*, 110

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5. Petitioner further asserts conflict with the district court opinion in *Wichman v. County of Volusia*, 110 F. Supp. 1354 (M.D. Fla. 1999). In *Wichman*, the court found the terms of the agreement were not sufficiently clear to justify summary enforcement. *Id.* at 1362. Again, since the issue in dispute involved the terms of the agreement, *Wichman* is consistent with the opinion here as well as *Murchison*.

F. Supp. at 1362. In each of those cases, the courts applied a knowing and voluntary standard due to concerns about the imbalance of power between an employee and employer and questions about the scope of the releases. *Id.* None of those circumstances exist here. Petitioner, with his lawyer by his side and before a court certified mediator, after two days of mediation, executed a settlement agreement which expressly covered his pending Title VII claims. Application of the knowing and voluntary factors, the "*Puentes* factors" in the Eleventh Circuit, have been expressly not required under facts similar to those presented here. In *Hayes v. National Serv. Indus.*, 196 F.3d 1252, 1253 (11th Cir. 1999), the Plaintiff appealed a decision enforcing an agreement settling a pending Title VII action. The Eleventh Circuit held that the law of contracts governs the construction of settlement agreements. *Id.*

Directly contrary to Petitioner's position that the application of the *Puentes* factors is required here, the Eleventh Circuit held otherwise in *Hayes*:

> Hayes argues that we must apply special criteria instead of (or in addition to) traditional contract principles established in state law when deciding whether to enforce settlements involving Title VII claims. *See, e.g., Puentes v. United Parcel Service, Inc.*, 86 F.3d 196, 198 (11th Cir. 1996) . . . This is *not* the applicable standard when reviewing a case in which the employee (or former employee) was represented by an attorney who settled the matter on the employee's behalf.

Hayes, 196 F.3d at 1254 (emphasis added). *See also Resnick v. Uccello Immobilen GMBH, Inc.*, 277 F.3d 1374, 1349 (11th Cir. 2000) (principles governing general contract law apply to interpret settlement agreements even though the settlement

agreement arose under the federal law); *Schwartz v. Florida Bd. of Regents*, 807 F.2d 901, 905 (11th Cir. 1987); *Rhein Med., Inc. v. Kohler*, 889 F. Supp. 1511, 1516 (M.D. Fla. 1995); *Acquisition Corp. of Am. v. FDIC*, 760 F. Supp. 1558, 1560 (S.D. Fla. 1991).

Petitioner argues that because the decision of *Eatmon v. Bristol Steel & Iron Works, Inc.*, 769 F.2d 1503 (11th Cir. 1985), predated *Hayes*, *Hayes* should be disregarded due to the prior precedent rule. The prior precedent rule, however, requires the identical issue. *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir. 1998); *United States v. Hogan*, 986 F.2d 1364, 1369 (11th Cir. 1993) (The prior panel precedent rule applies when the first panel has addressed a specific issue of law.). Because *Eatmon* and *Hayes* dealt with different issues of fact and law, and are not inconsistent with one another, the prior panel precedent rule cannot be applied.

Eatmon involved the prior release of a Title VII action, not the enforcement of an agreement resolving a pending action. *Eatmon*, 769 F.2d at 1504. Moreover, the issues before the court arose out of a conciliation agreement entered into pursuant to federal law with the Office of Federal Contract Compliance. *Id.* at 1515. In evaluating whether federal or state law controlled the interpretation of the conciliation agreement, the Eleventh Circuit determined that because the contract was entered into pursuant to authority conferred by a federal statute, its interpretation was governed by federal law. *Id.* at 1515. Thus, *Eatmon* can be applied in only very limited factual circumstances which are not present here. There is no conflict between *Eatmon* and *Hayes*.[6]

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6. Even if an intracircuit conflict did exist, an intracircuit conflict generally is not a sufficient basis for granting certiorari. (Cont'd)

C. The Eleventh Circuit's Opinion Does Not Conflict With Any Other Circuit Precedent.

1. The Eleventh Circuit's decision allowing enforcement of the settlement agreement without a hearing does not conflict with any other circuit precedent.

In an attempt to keep this protracted litigation alive, Petitioner claims that the Eleventh Circuit's opinion in this case affirming the enforcement of the settlement agreement without an evidentiary hearing is in conflict with precedent established by other circuits. Plaintiff is simply wrong. Each case cited by Petitioner for this purpose supports the Respondent's position.

Petitioner cites *Kukla v. National Distillers*, 483 F.2d 619 (6th Cir. 1973); *Autera v. Robinson*, 419 F.2d 1197 (D.C. Cir. 1969); *Petty v. Timken*, 849 F.2d 130 (11th Cir. 1988); and *Stewart v. M.D.F., Inc.*, 83 F.3d 247 (8th Cir. 1996) for this purpose. Unlike here however, in *Kukla* and *Autera*, there was a dispute as to whether a settlement agreement existed. Parties to the alleged settlement agreements in both cases claimed that no agreement ever had been reached. *Kukla*, 483 F.2d at 620 ("McIntyre asserted that neither he nor

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Davis v. United States, 417 U.S. 333, 340, 94 S. Ct. 2298, 2302 (1974). When faced with different decisions from different panels of a court of appeals, it is primarily the task of the court of appeals to reconcile its own internal difficulties. *Wisniewski v. United States of America*, 353 U.S. 901, 902, 77 S. Ct. 633, 634 (1957). Doubts about the respect to be accorded to a previous decision of a different panel should not be the occasion for invoking so exceptional a jurisdiction of the United States Supreme Court. *Id.*

Liberty Mutual's home office had ever agreed to the $35,000 redemption, and that they would not approve the same"); *Autera*, 419 F.2d at 217 ("The attorney stated further that he mailed the release and praecipes of dismissal to Mr. Autera who then called us the next day and decided that he did not want to sign them and he would not return them to us."). *Kukla* and *Autera* did not involve a signed settlement agreement. Further, both *Kukla* and *Autera* provide that it is well established that a trial court has the power to summarily enforce a settlement agreement where the terms and existence of the agreement are not in dispute. *Kukla*, 483 F.2d at 620, 622; *Autera*, 419 F.2d at 219, 221.

In *Stewart*, the district court refused to grant an evidentiary hearing even where the existence of an agreement was in dispute. *Stewart*, 83 F.3d at 250. The Eighth Circuit affirmed the district court's ruling that: (1) there is no automatic entitlement to an evidentiary hearing simply because the motion concerns a settlement agreement; and (2) a district court is well within its authority to conclude that a party has not, nor could not, attack the validity of a settlement agreement. *Id.* at 251.

In *Petty*, which involved a Title VII claim, the parties announced a settlement in open court and the plaintiff testified he understood that a settlement was reached. *Petty*, 849 F.2d at 132. After the district court dismissed the action without prejudice, the plaintiff refused to execute the settlement. *Id.* at 132. The Fourth Circuit affirmed the district court's summary enforcement of the agreement and held that summary enforcement is inappropriate only when there is a material dispute about the existence of a settlement agreement or the authority of an attorney to enter a settlement agreement on behalf of his client. *Id.* Similar to this case, Mr. Petty

made allegations of misconduct by his counsel. *Id.* at 132. The Fourth Circuit held that when a litigant voluntarily accepts an offer of settlement, the integrity of the settlement cannot be attacked on the basis of inadequate representation by counsel. *Id.* at 133. "[I]n such cases, any remaining dispute is purely between the party and his attorney." *Id.* (citing *Napica v. Chesapeake & Ohio Ry. Co.*, 582 F.2d 1344, 1346 (4th Cir. 1978)). The court concluded by holding that a litigant's "second thoughts about the level of his recovery. . . . does not, however, establish unfairness or justify setting aside an otherwise valid agreement. . . . Defeated expectations do not, therefore, entitle the litigation to repudiate commitments made to opposing parties or to the court." *Id.*

No conflict exists between the Eleventh Circuit's opinion and any other circuit regarding the summary enforcement of this settlement agreement. The Petition should be denied.

2. The Eleventh Circuit's opinion does not conflict with any other circuit precedent; application of either state or federal law to the enforcement of the settlement agreement would not change the outcome here.

Petitioner claims that the Eleventh Circuit's affirmance of the district court's decision applying state law to the settlement agreement in this case conflicts with precedent from other United States Courts of Appeals. Because the opinion at issue does not state which standard was applied in reaching its decision, no conflict can be established. Moreover, application of the *Puentes* factors as Petitioner claims was appropriate, would not change the outcome here.

The *Puentes* factors are as follows: (1) plaintiff's education and business experience; (2) the amount of time the plaintiff considered the agreement before signing it; (3) the clarity of the agreement; (4) plaintiff's opportunity to consult with an attorney; (5) the employer's discouragement of consultation with an attorney; and (6) the consideration given in exchange for the waiver when compared with the benefits to which the employee was obviously entitled. *Puentes*, 86 F.3d at 198. The only *Puentes* factor which Petitioner has raised as an issue in his petition is the amount of time Petitioner was given to execute the agreement. Petitioner has not and cannot assert that Respondent told Petitioner that he had a specific time period in which to execute the agreement. Further, the agreement was the result of two days of mediation. Because there is no dispute that Petitioner had the opportunity to consider the settlement agreement without interference or pressure by Respondent and Petitioner was represented by an attorney, Respondent would have prevailed under the application of any standard. As a result, this case does not provide the basis upon which certiorari should be granted.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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